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In the
SUPREME COURT OF THE UNITED STATES

October Term, 2004

JERRY REGIER, et al.,

Petitioners,

v.

DOES 1-13, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether enhancement of the lodestar amount of an attorney's fee award under 42 U.S.C. s. 1988 requires specific findings based on evidence of record that 1) the lodestar amount is unreasonable; 2) any factor relied upon to enhance the lodestar amount is necessary to obtain a reasonable fee; and 3) the degree of enhancement is necessary to obtain a reasonable fee.

2. Whether the record supports the district court's conclusion that this case was so "rare" and "exceptional" as to justify doubling the lodestar fee amount.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

Petitioner-defendants: Jerry Regier, Secretary of the Florida Department of Children and Families; Mary Ellen McDonald, District 11 administrator, Florida Department of Children and Families; Michelle Brantley, Assistant Secretary, Florida Department of Children and Families; and Robert Sharpe, Medicaid Director, Florida Agency for Health Care Administration.

Respondent-plaintiffs: the respondents appeared anonymously below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, executive branch officials of the State of Florida, respectfully petition the Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is unreported. It is reproduced at petitioners' appendix A. The district court's fee judgment is unreported. It is reproduced at petitioners' appendix B.

JURISDICTION

The court of appeals rendered its decision on January 16, 2004. Pet. App. A. This Court has jurisdiction under 28 U.S.C. s. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S. Code section 1988 states:

Proceedings in vindication of civil rights

(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS

§§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees. In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee.

STATEMENT OF THE CASE

The petitioners request the Court to review an order awarding plaintiffs in a civil rights action $649,869.50 in attorneys' fees. This amount was twice the lodestar. The issue is whether the district court applied the proper standards in enhancing an attorneys' fee lodestar.

This action was filed in March 1992 by 13 anonymous Medicaid-eligible individuals with developmental disabilities. The lawsuit was an attack on waiting lists for placement in intermediate care facilities for the developmentally disabled (ICF/DDs). ICF/DDs are residential treatment facilities that provide 24-hour care and services to severely disabled

individuals with developmental disabilities. *Doe 1-13 v. Bush*, 261 F.3d 1037 (11th Cir. 2001) (*Does II*). ICF/DDs are funded through the joint federal-state Medicaid program. *Id.* The respondents contended that they were not being provided ICF/DD services with "reasonable promptness," as required by 42 U.S.C. s. 1396a(a)(8) and the Fourteenth Amendment to the Constitution. *Doe v. Chiles*, 136 F.3d 709, 711 (11th Cir. 1998) (*Does I*). The petitioners are officials of the Florida Department of Children and Families and the Agency for Health Care Administration, the two state agencies charged with administering ICF/DDs and Medicaid.

The plaintiffs obtained a summary judgment and injunctive relief, which was upheld on appeal. *Does I.* The relief they obtained was that sought in the complaint. They later sought contempt for alleged violations of the judgment, but the Eleventh Circuit overturned a trial court order finding the defendants in contempt. *Does II.*

The plaintiffs moved for attorneys' fees and costs in September 1999, seeking fees of $339,950.50 for 1193.5 hours of attorney time, 736.8 hours for a "Sr. Partner" at $350/hour, 107.4 hours for a "Jr. Partner" at $195/hour, and 349.3 hours for "Associates" at $175/hour. The plaintiffs requested a 2.0 modifier, which brought their total fee request to $679,901. The defendants filed specific, line-by-line objections to the requested fees and costs.

In March 1999, the plaintiffs filed a supplemental fees and costs motion, seeking additional compensation for 183 hours of trial court work. Total fees in this request came to $94,650, an amount twice the proposed lodestar.

Finally, the plaintiffs sought fees for work on the merits appeal. They claimed $85,304.50 ($170,325 with a 2.0 multiplier), reflecting 311.5 hours -- 158.75 hours for the "Sr. Partner" at $350/hour, 152.10 hours for the "Jr. Partner" at $195/hour, and .5 hours for "Associates" at $175/hour. Again, the defendants filed detailed, line-by-line objections, both to the supplemental request and the appellate fees and costs.

Shortly after the court of appeals issued the mandate on the contempt appeal, the trial court entered an initial order awarding fees and costs. The court awarded fees of $430,156.25 on the initial and supplemental fee motions. In doing so it applied a 2.0 multiplier, denying every single defense objection. However, the court awarded no costs and said nothing about appellate fees.

The plaintiffs' objected to the order and moved for clarification. The district court then entered the order on review. Pet.App. 2. First, the trial court reduced hourly rates for work in the trial court from those requested by the plaintiffs. Although the plaintiffs asked $350/hour for Weinger, $195/hour for Tetzeli, and $175/hour for associates, the trial court awarded $250, $175, and $125 per hour respectively. The court provided no explanation for this reduction. Pet.App. B 7, 9-11.

Second, as to the number of hours worked, the trial court rejected the defendants' line-by-line objections, stating: "[T]he Court finds the Defendant's assertions to be insufficient as a basis for a finding that the work was reasonable or to defeat the sworn assertions by the attorneys that the hours were necessary." Pet.App. B 8.

The court applied the reduced hourly rates to the plaintiffs' hourly breakdown to reach a sub-lodestar for each billing lawyer. It then added the sub-lodestars to get a composite figure, which it enhanced by a factor of 2. *Id.* at 9-11.

The trial court justified awarding a 2.0 multiplier primarily "because this is a rare and exceptional case where an upward adjustment of the lodestar is appropriate due to exceptional success" and "groundbreaking results." Pet.App. B 9. The court cited a number of other reasons. Altogether, the district court's reasons for awarding an enhancement fell into six general categories: (1) the result obtained was excellent, (2) the case was novel, (3) it was complex, (4) it was lengthy, (5) the plaintiffs' attorneys were skillful, and (6) other counsel was unavailable and the case was undesirable. Pet.App. B at 8-9.

The district court did not require the respondents to demonstrate that the lodestar yielded an unreasonable fee, nor did it find the lodestar amount unreasonable. Further, the court failed to find that the factors used to enhance the lodestar were not already included in it or that an enhancement was necessary to obtain a reasonable fee.

The trial court made no appellate fee lodestar determination. It failed to fix hourly rates for appellate work or determine the reasonable number of hours expended. Pet. App. 11. Nonetheless, it awarded $85,304.50 in appellate fees. This number happens to be the amount of fees requested without application of a 2.0 multiplier. Pet.App. B 11.

Altogether, the trial court awarded fees as follows:

Type	Hours	Rate	Lodestar	With 2.0 Multiplier
Initial Fee Petition				
Sr. Partner	736.8	$250.00	$184,200.00	$368,400.00
Jr. Partner	107.4	$175.00	$18,795.00	$37,590.00
Associate	349.3	$125.00	$43,662.50	$87,325.00
Total	1193.5		$246,657.50	$493,315.00
Supplemental Fee Petition				
Sr. Partner	81.6	$250.00	$20,400.00	$40,800.00
Jr. Partner	51	$175.00	$8,925.00	$17,850.00
Associate	50.4	$125.00	$6,300.00	$12,600.00
Total	183		$35,625.00	$71,250.00
Fees on the Merits Appeal				
Sr. Partner	??	??	??	
Jr. Partner	??	??	??	

Type	Hours	Rate	Lodestar	With 2.0 Multiplier
Associate	??	??	??	
Total Appellate Fees			$85,304.50	
		Total Lodestar	$367,587.00	
Total Fee Award				$649,869.50

The circuit court affirmed without opinion. Pet.App. A. (It is not unusual for a circuit court to dispose of an attorneys' fee case without a written opinion. In fact, this court has granted review in two such cases, *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); and *Blum v. Stenson*, 465 U.S. 886, 889 (1984)).

REASONS FOR GRANTING THE PETITION

This Court has laid down specific guidelines for awarding enhancements to the attorneys' fee lodestar. Despite this specific guidance, the treatment of fee enhancements by the courts of appeals has not been consistent either with this Court's directives or with each other. Lodestar enhancements have been capriciously awarded by several courts of appeals in a variety of circumstances without paying heed to this Court's instructions for the need for specific facts in the record that the lodestar amount yield an unreasonable fee or that a given enhancement is necessary to obtain a reasonable fee (as happened in this case). Other courts of appeals, on the other hand, have followed the Court's instructions.

The substantial amounts of money involved in attorneys' fee litigation — multiplied by enhancements — threaten the fiscal integrity of public programs, because unreasonably high fee awards can result in less money available for public services.

Because the courts of appeal use inconsistent standards and methods in determining fee enhancements, such awards are capricious and inconsistent. The failure to apply clear, objective standards to such awards encourages the parties to litigate fee disputes. This fee litigation unnecessarily increases the judiciary's workload. What should be a process that is relatively easy to administer instead often becomes a "second major litigation."

This Court should revisit the question of fee enhancements once more to bring order, objectivity, and regularity to a process that is too often chaotic and unreasonable.

I. THE ORDERS BELOW CONFLICT WITH DECISIONS OF THIS COURT.

This Court's decisions leave no doubt that it is the truly rare case that may command a fee multiplier. The lodestar is presumed to yield a reasonable fee. The fee petitioner has the burden of demonstrating the lodestar fee is unreasonable and enhancement is necessary to reach a reasonable fee. Such a showing must be supported by specific evidence in the record, and the courts must make specific, detailed findings why the lodestar is unreasonable and why the requested enhancements are necessary. The decisions below fail to meet the standards this Court has set for enhancement of the lodestar amount.

This Court's body of law dealing with attorneys' fee enhancements or "multipliers" is well developed. The first case to deal with the topic is *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Hensley* is a "partial success" case, meaning that the plaintiffs succeeded on some, but not all, of their claims. When the plaintiffs petitioned for fees, they requested an enhancement ranging from 30-50 percent. The district court refused the enhancement. The issue was how to calculate an appropriate, reasonable fee when an attorney's work in the case may not have contributed to the result. This Court focused on the relationship that existed between the "results obtained" — the

degree of success achieved in the litigation — and an award of attorneys' fees. *Id.* at 432. The district court's paramount task is to determine a reasonable fee. *Id.* at 433. The "most useful starting point" for determining the reasonable fee is to calculate the product of "reasonable hours" times "a reasonably hourly rate." *Id.* "This calculation provides an objective basis on which to make an initial estimate of the value of an attorney's services." *Id.* This product is the "lodestar."

Determination of lodestar, however, "does not end the inquiry." *Id.* at 434. Other considerations "may lead the district court to adjust the fee upward or downward." *Id.* In a partial success case "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 436. Thus, the lodestar may yield an unreasonable fee.

The Court elaborated on the *Hensley* principles in *Blum v. Stenson*, 465 U.S. 886 (1984). *Blum* reaffirmed that the first step in an attorneys' fee analysis is determination of the lodestar. *Id.* at 888. While this Court termed the lodestar an "estimate" that might be subject to modification "as necessary," *id.*, it emphasized that the lodestar was far more than a "rough guess." *Id.* at 897. In fact, the Court held that the lodestar was "presumed to be the reasonable fee." *Id.*

Because the lodestar is presumed to be the reasonable fee, the *Blum* court went on to discuss when modifications — upward or downward — are justified to that figure. The district court had enhanced the lodestar 50 percent "because of the quality of representation, the complexity of the issues, the riskiness of success, and the 'great benefit to the large class' that was achieved." *Id.* at 891. But this Court rejected these justifications for enhancement one after another on the ground that they are all subsumed into either the hourly rate or the number of hours worked. *Id.* at 898-900. Thus, novelty, complexity of the issues, and the skill of counsel "should be reflected in the reasonableness of the hourly rates." *Id.* at 898. The quality of representation also is reflected in the hourly rate.

Id. at 899. The benefit to the class as well "generally will be subsumed within other factors used to calculate a reasonable fee [so] it normally should not provide an independent basis for increasing a fee award." *Id.* at 900. Moreover, the Court observed that the district court had failed to "explain . . . exactly how this determination affected the fee award." *Id.* at 899. Last, the Court concluded that the plaintiffs had failed to show by specific evidence in the record that the contingency of the risk of loss justified the fee enhancement. *Id.* at 901.

The *Blum* court made clear that the burden of demonstrating the need for an enhancement lay with the fee petitioner who must offer "evidence that enhancement was necessary to provide fair and reasonable compensation." *Id.* at 901. Like no other case from this Court, *Blum* sets the standard: the presumptive reasonableness of the lodestar, the burden to demonstrate how the lodestar is unreasonable and why a particular enhancement is necessary to obtain a reasonable fee. *Blum* also imposes an obligation on the district court to make specific findings about the inadequacy of the lodestar and the need for a particular enhancement.

The *Blum* court also rejected the practice of routinely awarding a fee enhancement because of "results obtained." This factor "generally will be subsumed within other factors used to calculate a reasonable fee." *Id.* at 900. The number of people benefitted is also not a significant factor in determining the fee award. *Id.* at 900 n. 16.

Blum is not the last word on enhancements. Because of recurring confusion among the courts of appeals, this Court has revisited the question of when enhancements are appropriate. In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), the Court reaffirmed that the lodestar is presumptively reasonable. *Id.* at 564. This presumption is a strong one. *Id.* at 565. The Court rejected the fee applicant's claim that the quality of their attorneys' representation by itself supported a fee enhancement: "the lodestar figure includes most, if not all, of the relevant factors constituting a

'reasonable' attorney's fee . . ." *Id.* at 566. Because attorney skill is already accounted for in the lodestar, a fee enhancement for that reason is "double counting." *Id.* at 566. While the Court did not rule out the possibility of upward enhancements, it emphasized that "such modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' in the record and detailed findings by the lower courts." *Id.* at 565.

A year later, the *Delaware Valley* attorneys' fee dispute returned to this Court for consideration of whether a fee could be enhanced because of contingency risk, *Delaware Valley II*, *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*, 483 U.S. 711 (1987). A plurality of the Court held that it could not, as this factor was subsumed by the lodestar. *Id.* at 727-731. The underlying teachings of *Blum* guided the thinking of the plurality. The Court reemphasized that the presumptive reasonableness of the lodestar limited enhancements to exceptional or rare cases "where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts." *Id.* at 728. Moreover, as a general rule, any enhancement should not exceed one-third. *Id.* at 720. "Any additional enhancement would require the most exacting justification." *Id.*

The notion that contingency risk does not support an enhancement gained majority support in *City of Burlington v. Dague*, 505 U.S. 557 (1992). Citing *Blum*, this Court held that the fee applicant has the burden of showing that "'such an adjustment is *necessary* to the determination of a reasonable fee.'" *Id.* at 562 (emphasis the Court's).

In sum, the Court's decisions make it clear that the lodestar amount is a presumptively reasonable fee. The fee applicant can overcome this presumption only with specific evidence showing that the lodestar amount is unreasonable. The applicant must demonstrate that the requested basis for enhancement is not otherwise subsumed by the lodestar and is necessary to make the fee reasonable. The district and circuit courts must make

specific findings on these factual matters. Only then does a case become sufficiently "rare" or "exceptional" as to warrant a fee enhancement. Finally, if the court believes that an enhancement of more than one-third the lodestar is warranted, the "most exacting justifications" are required, which in turn require specific judicial fact finding.

Here, the district court required far less of the fee applicant than this Court demands. It failed to require the applicant to show that the lodestar resulted in an unreasonably low fee or to make findings to that effect. It failed to require the applicant to demonstrate why enhancement factors were not already subsumed in the lodestar and why enhancement was necessary to obtain a reasonable fee. It further failed to make the specific findings this Court requires. The district court failed to articulate why the amount awarded constituted a reasonable fee. Moreover, the multiplier selected to reach the amount awarded was far higher than at least a plurality of this Court has been willing to accept without detailed justification. Finally, the district court enhanced the lodestar for reasons that this court has said are generally subsumed by the lodestar.

In order to ensure that this Court's policy of sharply limiting fee enhancements and requiring strict proof of their need is heeded by the lower courts, the Court should grant the writ and spell out in precise terms the precise analytical steps required before granting a fee enhancement.

II. THE COURTS OF APPEALS VARY WIDELY ON THE DEGREE OF PROOF AND THE JUDICIAL FINDINGS REQUIRED TO JUSTIFY ATTORNEYS' FEE ENHANCEMENTS.

The district court failed to determine that the lodestar was inadequate or to justify the enhancement according to the standards set by this Court. The circuit court affirmed without

opinion. The effect of such an affirmance was to adopt the opinion of the trial court as that of the circuit court.

Other circuits engage in much more rigorous review. In *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 789 F.2d 1348 (9th Cir. 1986), the district court awarded a fee multiplier for the plaintiffs' degree of success in the lawsuit and the contingency of the recovery. *Id.* at 1353. Guided by this Court's opinion in *Blum v. Stenson*, the Ninth Circuit panel rejected the contention that success alone was enough to support a fee enhancement. *Id.* Success is subsumed by the lodestar. *Id.* "Many clients with reasonable bargaining power would insist upon paying no more. We do not think the State of Arizona should be required to shoulder a greater burden." *Id.* The court rejected the claim that risk contingency warranted a multiplier in large part because "there is no evidence in the record that the representation actually posed a substantial risk to the law firm's business or that any risk presented was not adequately taken into consideration in setting the hourly rate." *Id.* at 1354. The court said that *Blum* precluded the use of a multiplier "unless the successful plaintiff has demonstrated that the lodestar amount does not represent a fully compensatory fee. The plaintiffs in this case have made no such showing . . ." *Id.*

The Ninth Circuit reaffirmed these principles in *Van Gerwen v. Guarantee Mutual Life Co.*, 214 F.3d 1041, 1046-1047 (9th Cir. 2000) (vacation of downward adjustment of .75 and remand when district court failed to find that the lodestar amount was unreasonable or explain why the hourly rate did not fully account for the quality of representation). See also *Odima v. Western Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1994) (error to award 50 percent enhancement when there was insufficient evidence in the record that the lodestar failed to yield a reasonable fee).

The Seventh Circuit's handling of enhancements is also at odds with the analysis in this case. In *In re UNR Industries*, 986 F.2d 207 (7th Cir. 1993), the question was payment of a

bankruptcy trustee's fees. The circuit court held that a lodestar approach was preferable to a common fund approach often used in bankruptcy matters, and that no enhancement was warranted. The court said, "such enhancements are not proper when the compensation awarded is reasonable." *Id.* at 211.

The Fifth Circuit's approach mirrors that used in the Ninth and Seventh circuits. In *Cooper v. Pentecost*, 77 F.3d 829 (5th Cir. 1996), the plaintiffs sought a $5 enhancement in their hourly rate and then a 2.0 enhancement as punishment for failure to comply with a consent decree. The circuit court held that no enhancement was warranted, relying on the principle that it "is appropriate for a court to enhance the lodestar amount only in certain exceptional cases where the prevailing party demonstrates that the enhancement is necessary to make the lodestar reasonable." *Id.* at 833. The *Cooper* district court found it had no authority to enhance the lodestar and the circuit court affirmed. *Id.* at 834. *See also Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993).

The Eighth Circuit in *Hendrickson v. Branstad*, 934 F.2d 158 (8th Cir. 1991), also rejected a 25 percent enhancement because of the fee applicant's failure to demonstrate factually why "an enhancement based on exceptional results was necessary to provide counsel with a reasonable fee." *Id.* at 162. Unlike the courts below in this case, the Eighth Circuit emphasized that enhancements "must be supported by specific evidence in the record and detailed findings by the lower court." *Id.*

Other circuits have ignored or skirted the requirement for specific facts in the record to justify an enhancement, for a finding that the lodestar is inadequate and for findings as to why a particular factor would make for an enhanced, reasonable fee. See *Hyatt v. Apfel*, 195 F.3d 188, 191-192 (4th Cir. 1999) (1.33 multiplier upheld without required findings); *In re Miniscribe Corp.*, 309 F.3d 1234, 1246 (10th Cir. 2002) (2.57 multiplier approved without findings).

In *Paschal v. Flagstar Bank, FSB*, 297 F.3d 431 (6th Cir. 2002), the circuit court approved a 50 percent enhancement where the district court had concluded only that the hourly rate awarded was "modest." The rate was below market, which could lead one to conclude the lodestar was unreasonable. But the district and circuit courts never went so far as to conclude the lodestar was inadequate. Nor did the circuit court require the district court to analyze why and how a given factor produced a reasonable fee.

The Eighth Circuit also approved a fee enhancement when the lodestar was "modest" without any specific evidence or finding that the amount was unreasonable. *Daggitt v. UFCW, Local 304A*, 245 F.3d 981, 990 (8th Cir. 2001) (25 percent enhancement approved).

In sum, there is little uniformity — and much caprice — both in the courts' analytical approach and in the amount of modifiers awarded. They can range from 25 percent to more than 2.57 times without any meaningful explanation of how or why the amount of the enhancement is necessary to achieve a reasonable fee. The courts of appeals' inconsistent approaches should not be allowed to continue.

III. THE AWARD OF FEE ENHANCEMENTS AGAINST PUBLIC BODIES ACCORDING TO UNCERTAIN CRITERIA PRESENTS AN IMPORTANT PUBLIC ISSUE.

The impact of attorneys' fee awards on public bodies is no trivial matter. The amounts awarded can be substantial, ranging into the millions of dollars per case. *See e.g.*, Deavel, *Birmingham's Employment Discrimination War*, 38 A.F.L.Rev. 197 (1994) ($2.5 million fee in Title VII case). In fact, fee awards — granted by Congress with the best of intentions to prevailing plaintiffs in fee shifting cases — can actually *reduce* funds available for public services. *See e.g.*, Andrews, *The*

Third Alternative: An Alternative to Race Consciousness and Color Blindness in Post-Slavery America, 54 Ala.L.Rev. 483, 526 (2003). Thus, improperly imposed fee enhancements, which substantially inflate fee awards, threaten the financial stability of public programs and services and could result in diminished public services for all.

The fee lodestar has been criticized for producing inconsistent results which have "damaged the objectivity and predictability of fee awards." Lamb, *The Lodestar Process of Determining Attorneys' Fees: A Guiding Light or Black Hole?*, 27 J.Leg.Pro. 203, 207 (2003). However, this "problem is also exacerbated by the inconsistent use of multipliers. These multipliers range anywhere from zero to four, producing wildly varying results." *Id.*

One factor relied on by the district court in this case to justify the multiplier, that other counsel were unavailable and the plaintiffs were unpopular, necessitates inquiry into community attitudes and local supply-and-demand of counsel. Substantial differences as to those facts are nearly inevitable, coloring the outcome and potentially producing bitter divisions. *See e.g.*, majority opinion and dissent in *Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691 (9th Cir. 1996).

The other factors relied on by the district court in this case to enhance the fee will never produce consistent results. The degree of success, the novelty of the issues, the complexity of the case, and the skill of the plaintiffs' lawyer can be used to justify any outcome and are not appropriate when a court awards compensation for every hour reasonably spent on the case. The failure of courts to apply uniform fee standards frustrates this Court's objective of preventing fee disputes from exploding into complex, time-consuming secondary litigation. *Hensley*, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation."); Muir, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31

Loy.U.Chi.L.J. 599, 615 (2000) ("federal courts do not apply the lodestar method uniformly. The resulting chaotic state of law fosters an excessive amount of litigation concerning the proper fee amount.").

Capriciously imposed fee enhancements endanger both the public treasury and public confidence in the judicial process. If enhancements are justified at all, they must be based on clearly articulated, not arbitrary, standards and on facts specifically set out in the record.

CONCLUSION

For these reasons, the Court should grant the petition.

RESPECTFULLY SUBMITTED,

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Counsel for Petitioners

Dated April 14, 2004

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2004

JERRY REGIER, et al.,

Petitioners,

v.

DOES 1-13, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-12117

D.C. Docket No. 92-00589-CV-ASG

JOHN/JANE DOE, 1-13 by and
through Mr/Mrs. Doe Sr. No.'s
1-13 as natural guardians on behalf of
John/Jane Doe 1-13 and on behalf of those
similarly situated,
FLORIDA ASSOCIATION OF
REHABILITATION FACILITIES
INCORPORATED, a Not-for-Profit
association,
UNITED CEREBRAL PALSEY OF
FLORIDA, INCORPORATED, a Florida
Not-for-Profit Corporation,

Plaintiffs-Appellees

versus

JEB BUSH, in his official capacity
as Governor of the State of Florida

ROBERT WILLIAMS, individually
and in his official capacity as Secretary
of the Department of Health and Rehabilitative
Services of the State of Florida,
GARY CLARKE, individually and
in his official capacity as Assistant
Secretary for Medicaid, Department of
Health & Rehabilitative Services
of the State of Florida,
CHARLES KIMBER, Assistant Secretary
of Developmental Services
SECRETARY OF HEALTH AND HUMAN
SERVICES, Edward A. Feaver,
in his official capacity,

Defendants-Appellants,

RICHARD LEPORE, in his
official capacity as Assistant
Secretary for Developmental Services
of the Department of Health &
Rehabilitative Services, State of Florida

Defendant,

BRETT CRAMER, by his father
and next friend, Cyrus Cramer,
DANTON DAVIS SMITH, by his legal
guardian Marion Smith,
ADVOCACY CENTER FOR PERSONS
WITH DISABILITIES, INC.

Consolidated Plaintiffs.

Appeal from the United States District Court
for the Southern District of Florida

(January 16, 2004)

Before WILSON and KRAVITCH, Circuit Judges, and GOLDBERG*, Judge.

---

*Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

---

[1] 11th Circuit R. 36.1 provides:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law;
and an opinion would have no precedential value, the

judgment or order may be affirmed or enforced without opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHN/JANE DOE 1-13 by and through M./Mrs. Doe Sr. No's1-13 as natural guardians on behalf of John/Jane Doe 1-13 and on behalf of those similarly situated, FLORIDA ASSOCIATION OF REHABILITATION FACILITIES INCORPORATED, a Not-for-Profit association, UNITED CEREBRAL PALSY OF FLORIDA, INCORPORATED, a Florida Not-for-Profit Corporation,

Plaintiffs,

vs. Case No. 92-589-CIV-FERGUSON

JEB BUSH, in his official capacity as Governor of the State of Florida, JERRY REGIER, in his official capacity as Secretary of the Department of Children and Family Services, et al.

Defendants.
_____/

ORDER VACATING FEBRUARY 7, 2002 ORDER ON FEES AND COSTS AND CORRECTED ORDER ON PLAINTIFFS' MOTIONS TO AMEND ORDER ON ATTORNEYS' FEES AND COSTS

THIS CAUSE is before the Court on the Plaintiffs' Motion for Attorneys' Fees and Costs [D.E. 452], Plaintiffs' Supplemental Claim for Attorneys' Fees and Costs [D.E. 537] and Plaintiffs' Motion to Clarify or for Re-Hearing and/or Relief from Order and/or Judgment on Attorneys' Fees and Costs [D.E. 617].

Factual Background

This litigation commenced ten years ago as the first in a series of lawsuits on behalf of developmentally disabled individuals. In 1996 a judgment was entered for the Plaintiffs ordering state officials to provide institutional care for eligible applicants. That judgment was affirmed. *See Doe v. Chiles*, 136 F.3rd 709 (11th Cir. 1998). Several years later the Plaintiffs filed a motion for contempt alleging that the Defendants had not placed the Plaintiffs in intermediate health care facilities as ordered and had not taken steps to comply with the final judgment. Indeed in the course of the litigation some of the Plaintiffs died. After a three day show cause hearing this Court held the Defendants in contempt by an order entered on October 7, 1999 and fined them $10,000 a day until commencement of acts showing compliance. The Defendants appealed.

In August, 2001 the Court of Appeals reversed the contempt order holding that the original injunction was too lacking in specificity and remanded for further proceedings. At a status conference held on January 25, 2002 counsel for the Plaintiffs answered in the affirmative when questioned whether he was abandoning the contempt motion. Obviously the Plaintiffs are content, for now, that the Defendants will comply with the judgment. This Court then entered an Order on February 7, 2002 on Plaintiffs' Motion for Attorneys' Fees and Costs, the order being reconsidered here.

Discussion

Having duly considered the motions, pertinent portions of the record it is ORDERED AND ADJUDGED that the Order

on Plaintiffs' Motions for Attorneys' Fees and Costs[D.E. 616] dated February 7, 2002 is VACATED.

THE FIRST APPLICATION FOR FEES

The Lodestar Amount

To determine an award of attorney's fees the Court must multiply the number of hours reasonably expended by a reasonable hourly rate. A reasonable hourly rate is determined by "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Housing Auth.*, 836 F.2d 1292, 1299 (11th Cir. 1988) (*citing Blum v. Stenson*, 465 U.S. 886 (1984)).

The plaintiffs' senior attorney, Steven M. Weinger ("Weinger"), has submitted his affidavit, the affidavits of other attorneys and other supporting documentation in support of an hourly fee. Weinger contends that he should be paid at the hourly rate of $350.90, that the junior partner should be paid at the hourly rate of $195.00 and that the other associates should be paid at the hourly rate of $175.00. Defendant contends that the Plaintiffs' hourly rate are excessive and suggests an hourly rate range of $125.00 to $250.00; however in 1992 Defendant's counsel stated that they had "little doubt that a court would award Mr. Weinger, based on his experience, his usual fee of $250.00 if this matter is litigated."

To determine the hours reasonably expended the Court must exclude hours that are "unreasonable to bill a client and therefore to one's adversary irrespective of the skill, reputation or experience or counsel." *Id.* (citations omitted). The Court must also exclude "excessive, redundant or otherwise unnecessary" hours. *Id.* (citations omitted). Nevertheless, a "court cannot piecemeal deduct hours expended, without some indication that the work was unreasonable." *Allen v. Freeman*, 694 F. Supp 1554, 1555 (S.D. Fla. 1988) (*citing, Johnson v. University College of the University of Alabama in Birmingham*, 706 F.2d 1205, 1207 (11th Cir. 1983).

Defendant challenges the hours the Plaintiff claims to have expended contending that (1) the fee application is inadequately documented (2) the billing contains impermissible multiple listings under a single time entry and (3) the billing repeats identical activities without explaining differences between what was accomplished for each listing. The Defendant's challenge to the reliability of Plaintiffs' billing records are buttressed by line-by-line objections charts specifically disputing many time and cost entries. The Defendant characterizes the itemized billing records as demonstrating "insufficient detail," "lumping," "duplicative," and "excessive [as to the] amount of time spent on task." Having reviewed the objection charts, the Court finds the Defendant's assertions to be insufficient as the basis for a finding that the work was unreasonable or to defeat the sworn assertions by the attorneys that the hours were necessary. In the application for fees it is claimed that the total amount of hours Plaintiffs' attorneys' expended was 1376.5. This is a relatively low number considering that plaintiffs' attorneys accrued these hours pursuing complex litigation over a ten (10) year period.

Adjustment of the Lodestar

The Court is enhancing the lodestar fees for both the motion for attorneys' fees and the supplemental claim for attorneys' fees by a multiplier of a 2.0 because this is a rare and exceptional case where an upward adjustment of the lodestar is appropriate due to exceptional success. *Blum v. Stenson*, 465 U.S. 886, 898-99 (1984) (recognizing an enhanced award of attorney's fees in cases of exceptional success); *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("in some cases of exceptional success an enhanced award may be justified")' *Loranger v. Stierheim*, 10 F.3d 776, 783 (1994) (declining to decide whether the case was a "rare and exceptional case where an upward adjustment of the lodestar is called for because of exceptional success"); *Allen v. Freeman*, 694 F. Supp. 1554, 1556 (1988) (court found enhancement of the loadstar amount appropriate because the results of the litigation were

exceptional). In enhancing the lodestar fee by a multiplier of 2.0 the Court has considered the complexity and novelty of the issues presented, the fact that fee attorneys have the ability or desire to represent plaintiffs of this type, the length of the litigation, and that the hours and time expended were taxing to counsel's small firm. The class of Plaintiffs in this case were developmentally disabled (i.e., mentally retarded) individuals who were claiming that the state acted unreasonably in denying or delaying the Plaintiffs access to immediate care facilities in violation of section 1396a(a)(8) and the Fifth and Fourteenth Amendments to the United States Constitution. The case was without significant precedent and the expert witnesses were outstanding in preparation for the hearings and in substantive knowledge of the highly specialized subject matter. Additionally, counsel's small law firm (approximately seven (7) members) was primarily responsible for the litigation and spent a decade representing these Plaintiffs in this hotly contested lawsuit.

Not only has the Court considered the above factors in enhancing the lodestar fee but has also considered the exceptional success and groundbreaking results achieved by the Plaintiffs in this case. In 1996 a judgment was entered for the Plaintiffs ordering state officials to provide institutional care for eligible applicants, some of whom had been waiting for many years without proper care. That judgment was affirmed on appeal by the Eleventh Circuit Court of Appeals in an opinion which painstakingly established the law to govern this case as well as several related cases which followed. *See Doe v. Chiles*, 136 F.3rd 709 (11th Cir. 1998).

Accordingly, the fee, including the lodestar and multiplier is calculated as follows:

TYPE	HOURS	RATE	LODESTAR	2.0X MULTIPLIER
Sr. Partner	736.8	$250.00	$184.200.00	$368,400.00

Jr. Partner	107.4	$175.00	$18,795.00	$37,590.00
Associates	349.3	$125.00	$43,662.50	$87,325.00
TOTAL	1193.5		$246,657.50	$493,315.00

It is further **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Attorneys' Fees and Costs [D.E. 452] is **GRANTED IN PART AND DENIED IN PART**. Plaintiffs are awarded fees on the first application in the amount of $493,315.00.

SUPPLEMENTAL CLAIM FOR FEES

The Lodestar Amount

The Defendant has filed objections to Plaintiff' Supplemental Claim for Attorneys' Fees and Costs similar to those filed for the initial motion for attorneys' fees and costs. Again, the Defendant has included an itemized chart detailing objections to the hours billed using the same language as in the previous objections. The Court finds Defendant's assertions to be insufficient to defeat a finding that the work was reasonable or to defeat the sworn assertions by the attorneys that the hours were necessary.

The fee, including the lodestar and multiplier is calculated as follows:

TYPE	HOURS	RATE	LODESTAR	2.0X MULTIPLIER
Sr. Partner	81.60	$250.00	$20,400.00	$40,800.00
Jr. Partner	51.00	$175.00	$8,925.00	$17,850.00
Associates	50.40	$125.00	$6,300.00	$12,600.00
TOTAL	183.00		$35,625.00	$71,250.00

It is further **ORDERED AND ADJUDGED** that Plaintiffs' Supplemental Claim for Attorneys' Fees and Costs [D.E. 537] is **GRANTED IN PART AND DENIED IN PART.** Accordingly, Plaintiffs are awarded additional fees in the amount of $71,250.00

APPLICATION FOR APPELLATE FEES AND COSTS

In addition to the attorneys' fees requested previously, the Plaintiff has requested litigation costs and appellate fees and costs pursuant to the Eleventh Circuit Court of Appeals May 19, 1998 Mandate. Having reviewed the Order of the Court of Appeals, considered the motion, response, reply and heard the parties' oral argument, the Court awards $85,304.50 for Plaintiffs' appellate fees and costs.

Finally, the Plaintiff requests additional litigation costs in the amount of $27,091.61 for further proceedings in this Court. Defendants have filed another itemized chart detailing objections to the costs portion using the same language as in the previous objection that there is primarily "no showing of necessity." Having reviewed the application, the costs objection chart and memoranda of law, the objections are overruled. The Plaintiffs' are awarded additional litigation costs in the amount of $27,091.61.

Conclusion

It is further **ORDERED AND ADJUDGED** that the Plaintiffs' Motion to Clarify or for Rehearing and/or Relief from Order and/or Judgment on Attorneys' Fees and Costs [D.E. 617] is **GRANTED IN PART AND DENIED IN PART.**

The total amount of fees and costs awarded the Plaintiffs pursuant to the motions is $676,961.11.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 15th day of March, 2003.

s/

WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

copies provided:
Steven M. Weinger, Esq.
W. Eugene Gandy, Jr., Esq.
Chesterfield smith, Jr., Esq.
Howard Talenfeld, Esq.
Jeffrey Ryner, Esq.
Stephanie Daniels, Esq., Esq.

(2)

Supreme Court, U.S.
FILED
MAY 19 2004
OFFICE OF THE CLERK

No. 03-1445

In The
Supreme Court of the United States

JERRY REGIER, et al.,

Petitioners,

v.

DOES 1-13, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STEVEN M. WEINGER, ESQUIRE*
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Attorneys for Respondent

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the decision of the Court of Appeals for the Eleventh Circuit followed the decisions of this Court and does not conflict with decisions of other Circuit Courts when it affirmed the District Court's award of attorney's fees in favor of Plaintiffs in their Section 1983 Civil Rights Class Action in which they represented a class of several thousand developmentally disabled individuals eligible for and in need of specialized Medicaid services who had been deprived of services by Defendants for many years.

OBJECTIONS TO PETITIONERS' "QUESTIONS PRESENTED"

Petitioners ignore the well-established standards for certiorari review by this Court. This Court does "not grant a certiorari to review evidence and discuss the specific facts." *United States v. Johnston*, 268 U.S. 220, 221 (1925). In this case the competent substantial evidence amply supports the opinions below.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

Petitioners-Defendants: The Petitioners/Defendants are Jerry Regier, Secretary of the Florida Department of Children and Families; Mary Ellen McDonald, District 11 Administrator, Florida Department of Children and Families; Michelle Brantley, Assistant Secretary, Florida Department of Children and Families; and Robert Sharpe, Medicaid Director, Florida Agency for Health Care Administration.

Respondents-Plaintiffs: The Respondents are eleven named Plaintiffs who represent a class of several thousand developmentally disabled individuals who were eligible for and in need of specialized Medicaid Services in ICF/DDs.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Plaintiffs/Respondents, John/Jane Does 1-13, respectfully file this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by the Defendants/Petitioners.

OPINIONS BELOW

The Court of Appeals' per curiam affirmance is unreported. The District Court's Order awarding attorney's fees is unreported. Both the Court of Appeals' affirmance without opinion and the District Court's opinion are reproduced in Petitioners' Appendix.

STATEMENT OF THE CASE

On March 13, 1992, Plaintiffs/Respondents ("Respondents") filed their Class Action Complaint. R. 1. Final Judgment was entered four years later on August 28, 1996. R. 449. Defendants/Petitioners ("Defendants") appealed.

The Court of Appeals affirmed the Final Judgment and remanded the case with instructions to the District Court to assess attorney's fees against Defendants. *Id.*; R. 488 (Mandate). *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998).

After entry of the Final Judgment, Defendants took the position that they were merely required to place language in the State Medicaid Plan setting a reasonable

waiting period but not required to actually provide services with reasonable promptness. *Doe v. Bush*, 261 F.3d 1037, 1047 (11th Cir. 1998). The Eleventh Circuit Court of Appeals found Defendants' position "untenable". *Id.* at 1047.

The District Court heard argument on the Plaintiffs' Motion for Attorney's Fees but entered an Order denying the motion until all post-judgment proceedings were completed and entered the final fee award on March 15, 2003, over eleven years after the lawsuit was commenced. Pet. App.5-11. Defendants appealed the District Court Order to the Eleventh Circuit Court of Appeals, the fourth appeal in this case. On January 16, 2004 the Eleventh Circuit entered its per curiam affirmance of the District Court's decision. Pet. App.1-4.

STATEMENT OF THE FACTS

A. Nature of the Case

Plaintiffs are a class of several thousand developmentally disabled individuals who were eligible for and in need of specialized Medicaid services in the Intermediate Care Facility for the Mentally Retarded/Developmentally Disabled ("ICF/MR" or "ICF/DD") program. Defendants failed to provide ICF/DD services to Plaintiffs, relegating them to years on waiting lists.

The ICF/DD program and the traumas suffered by the severely disabled class members who were deprived of life-preserving services for decades were documented by the Eleventh Circuit in affirming the Final Judgment. *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998). "[T]he record 'reveals

a plethora of facts showing the harm caused to developmentally disabled persons by the State of Florida's current procedure which allows eligible Medicaid recipients who have been determined to be in need of ICF/DD Services to be placed on indefinite waiting lists.'" *Doe v. Chiles, supra* at 713, n.7. Indeed, two of the thirteen named Plaintiffs died as the result of lack of essential services between the time the Complaint was filed and the entry of the Final Judgment. R. 627; 499, Tab 8 (1996 Whitaker Affidavit at ¶3).

Even after entry of the Final Judgment, Defendants repeatedly sought to avoid compliance. Upon remand, Defendants took the position that relief had only been ordered for the one dozen named class representatives and that Defendants were not required to provide any services to the other 2,000 individuals on the State of Florida waiting list who were eligible and awaiting services for many years. R. 579, at 1-9.

Prior to relief in this case, Florida ranked 49th among the states in providing for individuals with developmental disabilities and approximately 45th in providing ICF/DD beds per capita. R. 453, deposition of Donna Allen at 132; R. 453, Ex. 5, letter of Governor Lawton Chiles to the President of The Florida Senate at 1.

B. The Fee Award Is Supported By Uncontroverted Evidence

Through uncontroverted evidence, Plaintiffs established all the facts necessary to support the fee awarded by the District Court. The District Court credited this evidence, addressed and rejected the Defendant's objections, independently evaluated the file, and awarded the fee justified by the evidence. Pet. App.5-12. First the

District Court determined the lodestar. After determining the lodestar, the District Court determined that the lodestar should be adjusted as to hours expended in the District Court in accordance with established legal precedent. Pet. App.7-10. No adjustment of the lodestar was made for the fee award for work performed on the appeal to the Eleventh Circuit. Pet. App.11.

In adjusting the lodestar, the District Court made specific factual findings. Pet. App.8-11. All of the factual findings are based upon uncontroverted evidence and the District Court's personal observations during the course of the proceedings. *Id.* Defendants did not present any conflicting evidence as to any of the factual findings of the District Court used to upwardly adjust, or enhance, the lodestar before the Court of Appeals.

Some of the evidence omitted from Defendants' Statement of Facts is presented below.

1. Reasonableness of the Hours Expended

The Defendants claimed that the hours were unreasonable even though the hours claimed were minuscule compared to the hours expended by the Defendants' lawyers. One minor defense lawyer (Colodny, Fass and Talenfeld, P.A.) alone was paid for 400% more hours than the hours claimed by Plaintiffs' counsel. R. 462, 464, 465. In addition, Defendants utilized the services of two other law firms. Most significantly, a large team of lawyers from the Office of the Attorney General was lead counsel for the Defendants. Defendants' legal team spent perhaps 10 times as many hours as Plaintiffs' counsel in this case.

The Colodny firm was employed as private counsel for the Secretary of the Department of Children and Families and was paid by the Defendant State of Florida officials for its work. Colodny represented the Secretary in these proceedings up until the entry of the Final Judgment. R. 462, 464, 465. As can be seen from the record, this attorney did virtually no original work as the Office of the Attorney General took the lead as counsel for all Defendants.

Colodny billed and was paid for over 4,000 hours of work for its minor role in this case.[1] During that same time, Plaintiffs' counsel logged and was awarded only 1,193.5 hours by the District Court. Remarkably, the Defendants approved payment for these minor attorneys for over 4,000 hours while objecting to the hours of Plaintiffs' counsel who spent only 25% as many hours actually litigating the entire case and prevailing in obtaining relief. R. 464 at 7, n.10.

2. Hourly Rates

Just as Defendants frivolously and litigiously challenged the reasonable number of hours expended, Defendants challenged the hourly rate without a good faith basis. Near the inception of the lawsuit, in 1992, Defendants' outside counsel, Hinshaw & Culbertson, in another matter against the same Defendants advised Defendants that:

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[1] Colodny Fass and Talenfeld represented a single, individual capacity Defendant and were paid $328,789.50 by the Defendant State officials. R. 464 at 7, n.10.

> We have little doubt that a court would award Mr. Weinger, based upon his experience, his usual fee of $250.00 per hour. Second, since this case was filed before *Wilder* was decided, Mr. Weinger may also be entitled to a multiplier. R. 453, Ex. 1.

Remarkably, ten years later, Defendants argued to the District Court that the hourly rate of $125.00 per hour was the reasonable hourly rate for Plaintiffs' lead counsel, Mr. Weinger. R. 492 at 14, R. 627 at 3. Needless to say, the District Court's determination that the reasonable hourly rate of lead counsel was $250.00 per hour is amply justified by the evidence in the record. R. 627 at 3.

3. The Case Was Rare and Exceptional And Plaintiffs Obtained Exceptional Results

Aside from the evidence presented by Margulies[2],

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[2] **Margulies Declaration** – Professor Margulies, a respected lawyer experienced in federal court litigation provided evidence on the factors which the District Court was required to consider in setting a fee. Professor Margulies explained that the hours requested in the charts attached to the Motion for attorney's fees were "reasonable and necessary", that the case was "handled extremely efficiently", that the "results obtained were exceptional"; that he knew "from personal knowledge that the individuals who benefit from this ruling had been unsuccessful in finding any advocacy group or attorney . . . willing to perform the task of representing these individuals but for the agreement of Steven M. Weinger, Esquire, to represent them in this case"; "that the case was extremely complex and required a thorough knowledge of highly specialized areas of law such as Federal Medicaid Statutes and Regulations, the inner workings of the Florida Medicaid Plan, and a comprehensive knowledge of general civil rights law", that "at the time the claim was brought the claim was unique and novel", and that "without Steven M. Weinger, Esq.'s creativity and broad legal

(Continued on following page)

Rossman[3] and Weinger[4], the District Court had ample evidence from which to conclude that the Plaintiffs had

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knowledge, I do not believe this case would have been brought to a successful conclusion." R 454, 499 at Tab 3, paragraphs 4-8, R. 624, Tab 4, ¶4-8.

Finally, Plaintiffs' counsel's acceptance of this case adversely affected his reputation and/or that of his law firm. Margulies attested, "as a result of the litigation, Steven M. Weinger, Esquire's reputation among elected officials and state executive branch officials has been severely hurt. Although I know that Steven M. Weinger, Esquire, has engaged in the highest form of advocacy for the individuals he served, the hard fought battle to win benefits for these individuals has due to the unpopularity of this cause, and the unpopularity of providing additional funds for individuals with developmental disabilities, made the balance of his practice more difficult." R. 454, 499 at Tab 3, R. 624, Tab 4, Margulies Declaration at ¶9.

[3] **Rossman Affidavit** – Jonathan Rossman, Esq. represented individuals with disabilities in private practice after serving as the Executive Director of the Medicaid funded Florida Advocacy Center for Persons with Disabilities for 15 years. R. 499, Tab 4, ¶2.

Mr. Rossman explained that Plaintiff's counsel has "an exceptional range of skills all of which are needed in this case, including significant healthcare experience, significant personal experience with developmentally disabled individuals and direct personal experience in successfully litigating a massive, multi-party case against the Department of Health & Rehabilitative Services to obtain a preliminary injunction under the very same statute which is the basis for *Doe v. Chiles,* 42 U.S.C. 1396a(a). *Id.* at ¶9.

Mr. Rossman testified that he was professionally familiar with Plaintiff's lead counsel, and met with him on numerous occasions from "1990 through the present in regard to matters affecting developmentally disabled individuals. I have personal knowledge of Mr. Weinger's work and I have reviewed portions of some of the filings prepared by Mr. Weinger in the lawsuit entitled *John/Jane Does No.'s 1-13, et al. v. Lawton Chiles, et al.*" R. 453, Rossman Affidavit at ¶4. Mr. Rossman further attested in his Affidavit that "both Mr. Weinger and his law firm have established extremely positive reputations for their legal talents and public service, particularly for their work in complex Federal Court litigation." Rossman Affidavit at ¶8.

[4] **Plaintiffs' Counsel's Affidavit** – Plaintiffs' lead counsel was uniquely qualified to represent these Plaintiffs. Plaintiff is a 1978

(Continued on following page)

graduate of the University of Chicago Law School, who was also an instructor at the University of Miami School of Law and who taught courses in Section 1983 litigation. Mr. Weinger was also involved in preparation of a case book on Section 1983 litigation. R. 453, 499, Ex. 2 Affidavit of Steven M. Weinger, Tab 2, ¶¶ 1, 3 and 4.

In addition to his educational background, membership in relevant professional associations and national recognition (R. 453), he has substantial relevant legal experience. For over 20 years, his practice has been devoted almost exclusively to litigation, largely in Federal Court and more often then not involving complex litigation. R. 453. Plaintiffs' lead counsel has a significant experience in class actions and was first recognized as having substantial experience in representing Plaintiffs in class actions by former Chief Judge for the Southern District of Florida, The Honorable James Lawrence King in 1982. R. 453, Ex. 2. R. 499 Tab 2 ¶11(a). Thus, Mr. Weinger had substantial experience in litigating complex class action cases in federal court prior to filing the instant case in 1992. R. 499 Tab 2 at ¶11(b).

In addition to experience in complex class action litigation, Mr. Weinger was uniquely well-suited to represent the Plaintiffs in the instant case due to his expertise in the area of health law. See R. 453, Ex. 2, 499 ¶11 documenting his experience in federal litigation against state officials who were Defendants in this case, or their predecessors, for violation of the Medicaid Act, and experience in administrative litigation against the State and Department of Health and Rehabilitative Services.

Mr. Weinger's law firm "was the only firm, sole practitioner or legal advocacy group willing to undertake legal representation of the Plaintiffs against the State of Florida in the instant matter." R. 453, Ex. 2, R. 499, Tab 3 Affidavit 2.

"As a result of this litigation, Plaintiffs' counsel has been criticized by Florida officials and has, as a result lost potential clientele who have determined that their interests would be better served by engaging an attorney who is not actively litigating such a controversial case against state officials." R. 499 Tab 3 at ¶6. "Numerous facets of this lawsuit constituted priority work which required substantial expenditures of time and effort within a relatively short period of time. This summer in particular, I was precluded from accepting other employment due to my commitment to this case." Weinger also verified that "all of the factual assertions in the Memorandum of Law are true and correct to the best of my knowledge," and that "our law firm expended 1,193 hours as described in detail in time records attached hereto." R. 453, Ex. 2, R. 499 Tab 3 ¶8 and 9.

obtained exceptional results and that the case itself was exceptional.

a. Defendants' Admissions as to the Magnitude of the Case

In support of their Motion for Stay of the Final Judgment, Defendants argued that compliance with the Judgment would cost hundreds of millions of dollars and take years to accomplish. R. 461. Defendants took the same position before the Eleventh Circuit in their Emergency Motion for Stay, arguing that compliance would require expenditure of an "astronomical amount." See Appellants' Emergency Motion for Stay of January 17, 1997 at 3. Defendants asserted to the District Court that the cost of providing prompt treatment to class members would be between $750,000,000 to one billion dollars. R. 490-491, R. 599, Transcript of November 4, 1998 hearing at 49 where Defendants' counsel stated, "Moreover, I think despite the fact that Mr. Weinger was accurate, not only I, but my clients have made public in record statements that in order to comply with this Court's final judgment would cost the state between somewhere between 750 (sic) to a billion dollars annually. I think the accurate number is now the one that is being discussed currently, which is possibly two thousand people total, but six hundred here who are in immediate need."

It should be noted that after losing the appeal on the merits, Defendants refused to comply with the Judgment, claiming that the offer of an ICF/DD placement to the surviving 12 named Plaintiffs at minimal cost was complete compliance. R. 579 at 5-9. As the Eleventh Circuit explained in the second appeal, "the defendants themselves have

always understood that the relief granted in the final judgment was intended to be system-wide, and not just limited to the named Plaintiffs." *Doe v. Bush*, 261 F.3d 1037, 1050 (11th Cir. 2001). As a result, the litigation has benefited the 2000 eligible individuals as well as the hundreds or thousands of newly eligible developmentally disabled individuals who have entered the system since the Plaintiffs prevailed.

b. 2001 Status Report of National Association of State Directors of Developmental Disabilities Services, Inc.

Plaintiff also filed the 2001 Status Report of the National Association of State Directors of Developmental Disability Services, Inc., a "trade" association of State Directors administering Medicaid programs in the 50 states. R. 624, Tab 6. That report specifically referred to the instant case as follows:

> In March of 1998, the Eleventh U.S. [Court] of Appeals handed down a watershed decision in the Florida *Does v. Chiles* (now *Doe v. Bush*) litigation that made it clear that federal Medicaid law does not permit a state to 'wait list' individuals for ICF/MR services indefinitely. The Court ruled that ICF/MR services were no different than any other non-waiver Medicaid service, namely such services must be furnished with reasonable promptness to eligible applicants. *Most waiting list lawsuits elsewhere have been filed on the heels of this decision* . . . While the decision applies to states in the Eleventh Circuit, *it has been frequently cited as the basis of lawsuits filed in other Federal circuits*. R. 624, Tab 6, Status Report at 5 (emphasis added).

The Status Report went on to note that "as of March 2001, waiting list lawsuits have been filed in 15 states." R. 624, Tab 6, Status Report at 6.

Moreover, and as a result of this case, Florida's "funding for developmental services has increased by approximately $360,000,000 over the past two years." R. 624, Tab 6, Status Report at 7. Thus, in the opinion of the Association for State Developmental Disability Directors, i.e., counter-parts of the Defendants in the other 49 states, this was "a watershed" decision with a significant and far reaching impact on the lives of developmentally disabled individuals throughout the country. R. 624, Tab 6.

The remarkable impact of this case is also seen in the remarkable increase in funding for services for individuals with developmental disabilities in Florida and the repeated citations to *Doe v. Chiles* throughout the country in support of successful litigation to expand available healthcare services. The decision has also been cited in dozens of law review articles, treatises and cases.

In terms of making services available to individuals with developmental disabilities, no other case in the country has had as significant an impact as *Doe v. Chiles*. Defendants in this case valued the impact at hundreds of millions of dollars in additional services annually. Nationally, the impact is in the billions of dollars in new services for eligible individuals.

c. Defendants' Conduct and Other Circumstances Made This Litigation Exceptionally Challenging

Against all odds, without legal precedent, ignoring the Defendants' threats, without help from lawyers who

receive federal and state funds to advocate and litigate for individuals with disabilities, Plaintiffs' counsel successfully litigated this case for over a decade. R. 1-628. Thirteen years later, after 628 docket entries in the District Court and four appeals to the Eleventh Circuit, Defendants argued unsuccessfully to the Court of Appeals that the maximum total allowable fee is $91,896.75. This proposed figure includes over $27,000 in costs and all legal work in the trial Court and in the Court of Appeals on the appeal on the merits. Petitioner's Brief to Eleventh Circuit at 44. Defendants' proposed figure works out to $47.00 (Forty-Seven Dollars) per hour for the hours found reasonable and necessary by the District Court and by all of the experts. Defendants' position on attorney's fees is a powerful reminder of their litigation strategy from the inception of this case.

As a consequence of this case, Florida increased funding of services to its Medicaid eligible and developmentally disabled citizens by Three Hundred Sixty Million Dollars ($360,000,000.00) annually. See R. 624, Tab 6, at 7. Since entry of the Final Judgment literally billons of dollars in additional services have been provided.

Preparing and litigating this lawsuit was particularly challenging because:

1. The Defendants promised that they would litigate every possible issue and appeal every single Order (R. 453, Affidavit 2 of Weinger at ¶3) and they kept their promise as reflected in the docket sheet showing over 600 entries to date.

2. The stakes could not be higher. Prompt placement was a matter of life and death for many of the class members.[5] The cost of the services ordered by the District Court and affirmed by this Court was determined by the Defendants to be Seven Hundred Million Dollars ($700,000,000) to $1,000,000,000 (One Billion Dollars). E.g. 453, St. Petersburg Times Article; R. 599 at 49 (transcript of 11/4/98 hearing at which Defendants' counsel specifically admitted that Defendants and their counsel had made public statements that compliance with the Final Judgment would cost the state somewhere "between $750 million to a billion dollars annually.") Research discloses that State of Florida Officials have never been sued in a case that the State determined would have this significant a financial impact other than the litigation to clean up the Everglades.

3. The clients could not be more difficult to represent. These individuals are the lowest functioning developmentally disabled individuals. Many are non-verbal. Many are non-ambulatory. Many are fragile with severe medical problems. Many have extraordinarily difficult behaviors. R. 453, Tab 8. The Plaintiffs were unable to be gainfully employed because of their severe disabilities

[5] In her affidavit filed in 1996 in the case, federally recognized Qualified Mental Retarded Professional ("QMRP") Kathryn Whitaker advised that John Doe 3 died in an non-ICF/DD group home in the summer of 1993 during a "seizure- status-epileptics." Ms. Whitaker noted that "the group home did not have any nurses on staff or staff trained in the manner which meets the requirements of the training of staff at an ICF/DD facility and by the time the home finally dialed 911 John Doe 3 was deceased." R. 453 Whitaker Affidavit, Ex. 8.

and were therefore indigent and Medicaid eligible.

4. The Defendants promised retribution against the Plaintiff's counsel, caused the loss of business from paying healthcare clients seeking to resolve differences with the Defendants' offices (Defendants were the heads of the Agency for Health Care Administration, which operates the entire Florida Medicaid Program and all health care licensing, and the Department of Children and Families) R. 453, Ex. 3, Affidavit 2 of Weinger at ¶3; R. 454, 499 Margulies Declaration at ¶9.

5. No advocacy groups or public interest lawyers were willing or competent to gather the facts, learn the law, and take on the tremendous burden of this litigation. R. 454, 499, Margulies Declaration at ¶6.

Defendants repeatedly misrepresented the facts in the record and took frivolous positions. Defendants denied many of the allegations of the Complaint and then failed to present any evidence supporting the denial of these allegations during the course of the litigation and raised numerous affirmative defenses, none of which had a legal or factual basis. Indeed, on their appeal on the merits, the Eleventh Circuit described Defendants' factual argument that class members were not being harmed by the Defendants' delay in providing services as "meritless" and "frivolous" and described Defendants' argument on the alleged lack of standing based on the lack of harm as "unworthy of further discourse." *Doe v. Chiles*, *supra* at 713, n.7.

C. The Total Fee Award

In 2003, based on the foregoing analysis, the District Court awarded Plaintiffs fees of $649,869.50. Order, R. 627 at 7. This sum includes fees for both the work performed in the District Court since the inception of the case which was filed in 1992, through March 2003 and the fees for the successful appellate work before the Eleventh Circuit Court of Appeals.

REASONS FOR DENYING THE PETITION

The Defendants' Petition for Writ of Certiorari should be denied because the decision of the Eleventh Circuit Court of Appeals is not inconsistent with the decisions of this Court; does not conflict with the decisions of any other Court of Appeals; does not decide a federal question in a way that conflicts with a decision of a state court of last resort; does not call for this Court's exercise of its supervisory powers; and does not decide an important issue of federal law that has not been, but should be, settled by this Court. In sum, the decisions below properly apply existing precedent to the facts presented.

I. THE DISTRICT COURT PROPERLY AWARDED PLAINTIFFS AN UPWARD ADJUSTMENT OF THE LODESTAR BASED ON FINDINGS THAT THIS WAS A RARE AND EXCEPTIONAL CASE; "EXCEPTIONAL SUCCESS" AND "GROUND BREAKING RESULTS" ACHIEVED BY PLAINTIFFS

The District Court's Order explained that it was:

> enhancing the lodestar fees for both the motion for attorneys' fees and the supplemental claim for attorneys' fees by a multiplier of 2.0 because this is a rare and exceptional case where upward adjustment of the lodestar is appropriate due to exceptional success. *Blum v. Stenson*, 465 U.S. 886, 898-99 (1984) (recognizing an enhanced award of attorneys' fees in cases of exceptional success); *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) "in some cases of exceptional success an enhanced award may be justified"); *Loranger v. Stierheim*, 10 at F.3d 776, 783 (1994) (declining to decide whether the case was a "rare and exceptional case where an award went upward adjustment of the lodestar is called for because of exceptional success"); *Allen v. Freeman*, 694 F. Supp. 1554, 1556 (1988) (court found enhancement of the lodestar amount appropriate because the results of the litigation were exceptional.) Pet. App.8.

The District Court went on to state it:

> also considered the exceptional success and groundbreaking results achieved by the plaintiffs in this case. In 1996, a judgment was entered for the Plaintiffs ordering state officials to provide institutional care for eligible applicants, some of whom have been waiting for many years without

> proper care. That judgment was affirmed on appeal by the Eleventh Circuit Court of Appeals in an opinion which painstakingly established the law to govern this case and several related cases which followed. See, *Doe v. Chiles*, 136 F.3d 709 (11th Circuit 1998). Pet. App.9.

The District Court's findings were amply supported by the record.[6] As set forth in the Margulies and Weinger

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[6] Apart from an enhancement because of the rare and exceptional nature of this case, Plaintiffs in this eleven year old case are entitled to an upward adjustment of the fee based upon the seven year delay in the receipt of payment since entry of the Final Judgment in 1996. In *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989), this Court approved the enhancement of fees to compensate attorneys for delay in payment. As this Court explained:

> [C]ases have repeatedly stressed that attorney's fees awarded under this statute [§1988] are to be based on market rates for services rendered. Clearly, compensation received several years after the services were rendered – as they frequently are in complex civil rights litigation – is not equivalent to the same dollar amount received reasonably and promptly as legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment – whether by the application of current rather than historic hourly rates ***or otherwise*** – is within the contemplation of the statute. *Id. at* 283-284 (citations omitted) (emphasis added).

See also, *Norman v. Housing Authority of City Montgomery*, 836 F.2d 1292, 1300 (11th Cir. 1988) ["In this Circuit, where there is a delay the court should take into account the time value of money and the effects of inflation and generally award compensation at current rates rather than at historic rates"]; *Davis v. Locke*, 936 F.2d 1208 (11th Cir. 1991), (multiplier for delay and difficulty obtaining counsel and risk); *Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 633-34 (11th Cir. 1990) (1.33 multiplier for delay); *Tufaro v. Willie*, 756 F. Supp. 556, 563 (S.D. Fla. 1991); *Amico v. Newcastle County*, 654 F. Supp. 982, 1008 (D. Del. 1987); *Weiss v. York Hospital*, 628 F. Supp. 1392, 1414-15 (N.D. Pa. 1986); *Institutionalized Juveniles v. Secretary of Public Welfare*, 568

(Continued on following page)

Affidavits, this was a complex case presenting novel issues. R. 624 at Tab 4 and 5 especially Margulies Affidavit at ¶7 noting "the case is extremely complex and will require a thorough knowledge of highly specialized areas of law such as the Federal Medicaid Statutes and Regulations, the inner-workings of the Florida Medicaid Plan and comprehensive knowledge of the Federal Civil Rights Law. At the time the case was brought, the claim was unique and novel." See also R. 624, Tab 6, Status Report by National Association of State Directors of Developmentally Disability Services, Inc., at 5, describing this case as a "watershed" and groundbreaking case, noting the decision has "been frequently cited as the basis of lawsuits filed in other federal circuits", and that "most waiting list lawsuits elsewhere have been filed on the heels of this decision."

Moreover, as documented in filings for the District Court, this cause was an unpopular one and adversely affected Plaintiffs' counsel's law firm. No other attorneys, even those working with advocacy groups, were willing to accept this case. R. 454. "As a result of litigation" lead counsel's "reputation among elected officials in the state and executive branch has been severely hurt . . . and the hard fought battle to win benefits for these individuals has, due to the unpopularity of this cause, and the unpopularity of providing additional funds to individuals with developmental disabilities, made the balance of his

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F. Supp. 1020, 1033 (E.D. Pa. 1983); *In re Baldwin-United Corp.*, 79 BR 321, 346-350 (Bkrtcy. S.D. Ohio 1987); *Cerva v. EBR Enterprises*, 740 F. Supp. 1099, 1106-1109 (E.D. Pa. 1990); *Williams v. Marriott Corp.*, 669 F. Supp. 2, 6 (D.C. 1987); *U.S. v. Aisenberg*, 247 F. Supp. 2d 1272 (N.D. Fla. 2003) (1.5 multiplier based on five year delay).

practice more difficult." R. 454 at ¶9. As a result, Plaintiffs' counsel's practice suffered. R. 453, Ex. 3, Weinger Affidavit, explaining that potential clients determined their interests would be better served by using another attorney without such an adversarial relationship with state officials.

II. NEITHER THE PER CURIAM AFFIRMANCE NOR THE UNPUBLISHED DISTRICT COURT OPINION CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR ANY OTHER COURTS OF APPEAL

In their Petition to this court, the Defendants fail to set forth any decision that conflicts with the Eleventh Circuit Court of Appeal's affirmance in this case or with the District Court's opinion. This is not surprising as the decision of the Eleventh Circuit does not cite any cases, but is instead a per curiam affirmance without opinion, citing to Eleventh Circuit Rule 36.1. Eleventh Circuit Rule 36.1 provides in pertinent part:

> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous; . . .
>
> (e) judgment has been entered without a reversible error of law; and opinion would have no precedential value, the judgment or order may be affirmed without opinion.

The Court of Appeals and the District Court both applied relevant law. There is no conflict between this case

and the cases cited by the Defendants. Thus, no conflict exists justifying a grant of certiorari in this case.

A. The Decisions Follow All Prior Decisions of This Court

This Court has made clear that attorney's fee cases are determined by their respective facts, and the District Court is given substantial discretion in determining the appropriate fee. See e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 430, 437 (1983) noting "the amount of the fee, of course, must be determined on the facts of each case"; and emphasizing "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters."

Upward enhancements of a lodestar are authorized by this Court in *Hensley* and its progeny. See e.g. *Blum v. Stenson*, 465 U.S. 886 (1984); *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 478 U.S. 546 (1986). Thus, as this Court held in *Hensley*, "the product of the reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the District Court to adjust the fee upward or downward, including the important factor of the results obtained." *Hensley, supra* at 434. *Hensley* involved a §1983 claim for fees where Plaintiffs had not succeeded on all their claims and did not involve an upward adjustment to the lodestar. This Court remanded the case for the District Court to consider the relationship between Plaintiffs' success in the litigation and the fee award, which is exactly what the District Court did in this case. *Hensley*, therefore, does not conflict with the District Court's decision in this case, as Defendants do not challenge the lodestar in their Petition, and as it expressly

recognizes that the District Court is authorized to adjust the fee up or down, based on its superior knowledge of the litigation and based on relevant considerations.

Defendants also rely on *Blum v. Stenson*, 465 U.S. 886 (1984). There is no conflict between *Blum* and this case. In *Blum*, this Court reaffirmed that "a District Court is authorized, in its discretion, to allow a prevailing party an upward adjustment in attorney's fees in cases of exceptional success." *Blum, supra* at 896. This Court in *Blum* rejected the Defendants' argument that "upward adjustments are never reasonable" but reversed the fee award because the District Court's award of an enhancement in that case was based partially on a contingency risk factor. This was not a basis for the multiplier awarded in this case. Moreover, unlike the Plaintiffs in this case, the plaintiff in *Blum* failed to carry her burden of proving that an upward adjustment was justified.

In *Blum,* this Court explained that, "the record before us contains no evidence supporting an upward adjustment of fees calculated under the basic standard of reasonable rates times reasonable hours. The affidavits of Respondent's attorneys do not claim, or even mention, entitlement to a bonus or upward revision." *Blum, supra* at 896. In contrast, the issue of a multiplier in this case was extensively supported by competent, substantial, uncontroverted evidence and this issue was litigated by the parties before the District Court and the Court of Appeals. The District Court made specific findings upon which it based enhancement of the lodestar including "the groundbreaking results achieved by the Plaintiff in this case" and the Eleventh Circuit's affirmance which it described as "an opinion which painstakingly established the law to govern this case as well as several related cases which followed." Pet. App.9. Moreover, the Plaintiffs in this case, as set forth in the affidavits and

other record evidence, established the exceptional and indeed seminal nature of this litigation. See e.g. R. 490-91, R. 599, R. 624, Tabs 1-7. As set forth in the record before the Eleventh Circuit Court of Appeals, the decision has been described as "watershed" and led to the filing of similar cases on behalf of developmentally disabled individuals in at least 15 other states. R. 624, Tab 6.

Defendants also refer to this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 478 U.S. 546 (1986). Again, the facts of that case are inapposite to the facts of this case and the opinion of the District Court and the Eleventh Circuit Court of Appeals in this case are wholly consistent with this Court's opinion in *Delaware Valley*. First, the enhancement that was reversed in the *Delaware Valley* case was based partially on a contingency risk multiplier. *Delaware Valley*, *supra* at 555-556. This factor did not form any part of the analysis of the District Court in this case. Moreover, in *Delaware Valley* this Court reaffirmed its holding in *Hensley* reiterating that "the product of reasonable hour times a reasonable rate does not end the inquiry. There remain other considerations that may lead the District Court to adjust the fee upward or downward . . . ." *Delaware Valley* at 564, citations to *Hensley v. Eckerhart*.

This Court then reiterated that in *Hensley* it "took a more expansive view of what those 'other considerations' might be," noting that "the District Court also may consider the factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Delaware Valley*, *supra* at 564.

Finally this Court in *Delaware Valley* held that upward adjustments in "rare" and "exceptional" cases are

allowed when supported by specific evidence on the record and findings by the lower court. *Delaware Valley*, *supra* at 564. As in *Blum*, this Court in *Delaware Valley* reversed the fee award because the Plaintiff in that case "presented no specific evidence as to what made the results it obtained . . . 'so outstanding'." *Delaware Valley, supra* at 567-568. Indeed, this Court in *Delaware Valley* based its decision in part on the District Court's "elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive" as this was "not supportive of the [District] Court's later conclusion that the remaining hours represented work of 'superior quality'." *Delaware Valley, supra* at 568. In contrast, the District Court in the case at bar did not make any findings inconsistent with superior quality work and Plaintiffs in this case presented substantial, uncontroverted evidence of the rare and exceptional nature of this case.

The only other Supreme Court decision cited by Defendants is *City of Burlington v. Dague*, 505 U.S. 557 (1992). Defendants seem to admit in their petition that *Dague* is distinguishable from this case as it stands solely for the proposition that an enhancement for contingency of an attorney's fees award to a prevailing party is not permitted. Thus, there is no conflict with *Dague* as Plaintiffs in this case were not awarded a multiplier based on contingency.

B. The Decision Does Not Conflict with the Decisions of Any Other Circuit Court

None of the circuit court decisions cited by Defendants present a conflict with this case. *Planned Parenthood of Central and Northern California v. Arizona*, 789 F.2d 1348 (9th Cir. 1986) predates the Ninth Circuit's decision in

Guam Society of Obstetricians and Gynecologists v. Ada, 100 F.3d 691 (9th Cir. 1996), a section 1983 action against state officials where the Court of Appeals affirmed a multiplier of two times the lodestar amount because of the "visible and controversial nature of the case." This case is wholly consistent with the Ninth Circuit's more recent decision in the *Guam* case, cited by Plaintiffs in their Motions for Attorney's Fees filed with the District Court, and in their brief to the Eleventh Circuit Court of Appeals.

Further, there is no inconsistency between this case and the Ninth Circuit's decision in *Planned Parenthood*. The *Planned Parenthood* case involved a request for a multiplier based in part on the contingency aspect of the case and was decided six years before this Court directly addressed this issue in *City of Burlington v. Dague*, 505 U.S. 557 (1992). Moreover, the Plaintiffs in *Planned Parenthood* failed to provide any evidence "that the representation actually posed a substantial risk to the law firm's business or that any risk presented was not adequately taken into consideration in setting the hourly rate." *Planned Parenthood*, *supra* at 1354. In contrast, Plaintiffs in the case at bar made a compelling and uncontroverted showing that the law firm was shunned by paying healthcare clients as a result of this suit against state healthcare officials, that the life or death nature of this case adversely affected Plaintiffs' counsel's law firm and also established other factors supporting an enhancement including the groundbreaking and beneficial results of this litigation. R. 490-91; 590; 626.

Defendants suggest that this case conflicts with *Van Gerwen v. Guarantee Mutual Life Company*, 214 F.3d 1041 (9th Cir. 2000). In *Van Gerwen*, an ERISA case, the Ninth Circuit reversed an award of a multiplier where there was

no evidence the case was rare and unusual and where the Plaintiffs' attorney's work was inferior. Indeed, as the Ninth Circuit noted in that case, the District Court had reduced the award by applying a "*downward* multiplier" of .75 based on the "poor quality of the attorney's work." *Van Gerwen, supra* at 1044. (emphasis added). The Appeals Court in *Van Gerwen* reversed, holding that the District Court could not reduce the rates based on the poor quality of representation without making findings of fact. *Van Gerwen, supra* at 1049. *Van Gerwen* is therefore patently distinguishable from the case at bar where the opposite was true as the District Court specifically found that the Plaintiffs' counsel did a superior job.

Defendants' reliance on *Odima v. Western Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1994) is also meritless. In *Odima*, a partial success case, the Circuit Court found that the Plaintiff had failed to demonstrate that an enhancement to the lodestar was justified. The Ninth Circuit in *Odima* simply remanded the case as the District Court did not set forth sufficient information supportive of the enhancement. *Odima, supra* at 1500. There is therefore no conflict between *Odima* and this case when the record here is replete with evidence supporting lodestar adjustment.

UNR Industries v. Schwartz, Cooper, Kolb & Gaynor Charter, 986 F.2d 207 (7th Cir. 1983) also does not conflict with the case at bar. In *UNR*, a bankruptcy case, the Seventh Circuit Court of Appeals simply affirmed the District Court's decision that the bankruptcy judge's denial of a multiplier under 11 U.S.C. §330 was not clearly erroneous. *UNR, supra* at 211. *UNR* did not involve 42 U.S.C. §1988 or any fee shifting statute. Most importantly, the discussion and analysis of fee enhancement in *UNR* is entirely consistent with the decisions in this case.

In *Cooper v. Pentecost*, 77 F.3d 829 (5th Cir. 1996), a 1983 class action brought on behalf of prisoners against a County jail, the Circuit Court affirmed the District Court's Order awarding attorney's fees and denying a multiplier. Again, unlike this case, the District Court in *Cooper* found that the Plaintiff submitted duplicative, repetitive and excessive hours. *Cooper*, *supra* at 832. Such is not the case here. Moreover, directly contrary to the record in this case, the record in *Cooper* showed no "oppressive, unpleasant or intimidating conditions" affecting Plaintiffs' counsel which would support an enhancement. *Cooper*, *supra* at 834.

In *Watkins v. Fordice*, 7 F.3d 453 (5th Cir. 1993) the Fifth Circuit Court of Appeals, relying on the virtually axiomatic legal principle that a District Court has "broad discretion in setting reasonable attorney's fees" and concluded the District Court "did not abuse its discretion" by refusing to either enhance or reduce the lodestar in a Voting Rights Act case. *Watkins*, *supra* at 460. There is therefore no conflict between *Fordice* and the decisions in this case.

Finally, Defendants rely on *Hendrickson v. Branstad*, 934 F.2d 158 (8th Cir. 1991). *Hendrickson* is also distinguishable from the case at bar and is not inconsistent with this case. *Hendrickson*, unlike this case, is a case where the Plaintiff was only partially successful in his claims. *Hendrickson*, *supra* at 161. As the Court in *Hendrickson* noted the enhancement was based in part on a contingency risk multiplier, not a factor here. *Hendrickson*, *supra* at 163.

Moreover, the District Court in *Hendrickson* found that counsel was awarded a large amount of billable hours in the case and the Court of Appeals found therefore that the lodestar was reasonable. *Hendrickson, supra* at 164. In

contrast, Plaintiffs in this case billed a "relatively low number" of hours, as found by District Court. Pet. App.8.

C. No Lack of Uniformity Exists in the Circuit Court Decisions

Defendants suggest that certiorari in this case is required due to lack of "uniformity" and "caprice" in Circuit Court decisions on this issue. Petition at 15. Defendants cite to *Hyatt v. Apfel*, 195 F.3d 188 (4th Cir. 1999). Defendants state that the Fourth Circuit in *Hyatt* "ignored or skirted the requirement for specific facts in the record to justify an enhancement." Petition at 14. This allegation is simply wrong and even a cursory review of the Fourth Circuit's decision in *Hyatt* establishes the inaccuracy of this statement. As the Fourth Circuit explained in its well reasoned opinion, the litigation in that case was over a decade old and had been the subject of "four published opinions of this court, a remand by the United States Supreme Court, and numerous District Court decisions leading up to the appeals." *Hyatt*, *supra* at 189-90.

In its lengthy opinion, the Fourth Circuit quoted the District Court's findings supporting an enhancement in that case. The District Court's findings were detailed and specific. *Hyatt supra* at 191-93. As a portion of the District Court's decision reproduced in the Fourth Circuit opinion noted, "the success achieved by Plaintiff is properly characterized as exceptional. Plaintiffs have succeeded in bringing about fundamental change to a recalcitrant agency which brought all of the power of the federal government to bear on Plaintiffs and their counsel while it resisted Plaintiffs' efforts to enforce the orders of this Court and the Fourth Circuit each step of the way." *Hyatt*, *supra* at 191-193.

Defendants also again overreach when they describe the *Miniscribe Corp.* decision also as having "ignored or skirted the requirements for specific facts in the record to justify an enhancement." *In re Miniscribe Corp.*, 309 F.3d 1234 (10th Cir. 2002), a bankruptcy case, the Tenth Circuit Court of Appeals in a detailed opinion exhaustively described the proceedings below which involved a claim for attorney's fees by a trustee. The Tenth Circuit found that the lodestar test is the appropriate method of calculating reasonable compensation for a Chapter 7 trustee. The Court reduced the hourly rate of $500 per hour, and affirmed the 2.57 lodestar multiplier awarded by the bankruptcy court, "given the strong findings by the bankruptcy court in support of its determination that the result achieved was sufficiently extraordinary to justify a multiplier, and the reasoning of the District Court flowing from these findings, we cannot conclude, based on our standard of review, that the District Court erred by applying a 2.57 multiplier." *Miniscribe*, *supra* at 1245.

The Defendants' characterization of the Sixth Circuit Court of Appeals' decision in *Paschal v. Flagstar Bank, FSB*, 297 F.3d 431 (6th Cir. 2002) is simply wrong. Defendants' statement that the "circuit court approved a 50% enhancement where the District Court concluded *only* that the hourly rate awarded was 'modest'" is not accurate. Petition at 15 (emphasis added). In fact, the Sixth Circuit in *Paschal* noted that in addition to the relatively low hourly rate awarded, the District Court's decision to enhance the attorney's fee award was also expressly based on the "excellent job the attorneys did at trial, the fact that the case involved claims that were difficult to prove, and the fact that the marshalling of evidence was an arduous and time consuming task." *Paschal*, *supra* at 435-37. The Sixth Circuit found that

based on the relevant law, the record and those findings, the District Court did not abuse its discretion. *Paschal, supra* at 436.

III. DEFENDANTS' CRITICISM OF THE FACTORS ESTABLISHED BY THIS COURT FOR THE DETERMINATION OF A REASONABLE FEE ARE MERITLESS

Defendants complain that this Court's intervention is necessary for the uniform application of these standards. Defendants' petition fails to provide any convincing reason for further clarification or formulation of standards governing attorney's fee awards in general or as to public bodies in particular. The Defendants' suggestion that this Court eliminate one of the factors relevant to determination of a reasonable fee award, i.e., that other counsel were not available and that the Plaintiffs were unpopular because of differences as to those facts is meritless. Trial courts are well-suited for weighing facts and applying the law. As this Court has indicated these cases are fact specific. Changing the law as requested by Defendants would not produce predictability of decisions or uniformity among courts. Significantly, there was no difference of opinion between the District Court and the Eleventh Circuit Court of Appeals in this case, nor among the members of the panel that affirmed this decision.

Defendants are understandably unhappy with the results of this litigation and of the attorney's fee award. However, Defendants failed to rebut substantial evidence submitted by the Plaintiffs establishing the existence of all the factors relevant to the fees ultimately awarded by the District Court and affirmed by the Court of Appeals in this case. Thus while the Defendants hypothize that "improperly

imposed fee enhancements" "threaten the financial stability of public programs and services and could result in diminished public services for all" (Plaintiffs' Petition at 16), in the case at bar the end result was quite predictable and could have been avoided by Defendants. Defendants moreover failed to controvert, rebut or address this evidence, including affidavits and other evidence expressly establishing the appropriateness of a fee enhancement. See, e.g., R. 490-91, 599, 624.

Defendants' intent in requesting this Court to change the law and disturb well-established precedent is no doubt motivated by their dissatisfaction with the factual findings upon which the legal conclusions of the District Court and the Eleventh Circuit rest in this case. However, this Court does not normally grant certiorari in such cases. See, e.g., *United States v. Johnston*, 268 U.S. 220, 221 (1925) "we do not grant a certiorari to review evidence and discuss the specific facts."

CONCLUSION

The Petition for Certiorari should be denied since the lower Courts correctly applied the standard.

Respectfully submitted,

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